
(2011) 03 J&K CK 0010

Jammu & Kashmir High Court

Case No: Criminal Appeal No. 32 of 2008

Parvez Ahmed and
Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision: March 25, 2011

Acts Referred:

- Ranbir Penal Code, 1989 - Section 109, 363, 376

Citation: (2011) 1 JKJ 796

Hon'ble Judges: Hasnain Massodi, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Hasnain Massodi, Judge

1. Shri Bashir Ahmed Sheikh S/o Din Mohd. Sheikh R/o Dharmot Tehsil Batote on 21.12.2001, lodged a written report with Police Station,

Batote alleging therein that his minor daughter, who had gone missing on 17-12-2001, was kidnapped by Parvez Ahmed S/o Mohd. Hussain

Magrey R/o Bhagwat, with the assistance of Swami Raj R/o Manama, bundled in Maruti Van No. JK02N 9573 and taken to Jammu. The report

led to registration of case FIR No. 157 of 2001 under sections 363/109 RPC at Police Station, Batote. The investigation was taken over by Shri

Mohd. Aslam, SHO Police Station, Batote. The efforts made by the Investigating Officer to trace the kidnapped girl bore fruit, when she was

recovered from the residential house of appellant-Farooq Ahmed at Nai Basti, Jammu. The investigation revealed that the victim was kidnapped

by appellants- Parvez Ahmed, Farooq Ahmed, Tanveer Ahmed, Imtiyaz Ahmed and Swami Raj and brought in Maurti Van No. JK 02N 9573

from Batote to the house of appellant-Farooq Ahmed at Nai Basti, where appellant-Parvez Ahmed committed rape on the victim.

2. The Investigating Officer after usual investigation, found appellant-Parvez Ahmed, to have committed offences punishable under sections 363,

376 and 342 RPC and appellants- Imtiyaz Ahmed and Tanveer Ahmed all residents of Bhagwat, Batote, Swami Raj R/o Shampa, Batote and

Farooq Ahmed R/O Nai Basti, Jammu, to have committed offences punishable under sections 363, 376, 342 read with 109 RPC. The

investigation was concluded as proved against the appellants and the charge sheet presented in the Court of JMJC/Sub judge, Batote on

19.02.2002 and the case committed to the Sessions Court at Ramban.

3. The Trial Court on 4-4-2002 formally charged the appellant-Parvez Ahmed of offences punishable under sections 363, 376 and 342 RPC and

other four appellants of offence punishable under sections 363,376,342 and 109 RPC. The appellants denied the charge, leaving no option for the

prosecution, but to examine witnesses listed in column - 4 of the charge sheet, in support of the charge. The prosecution in all examined eight of

nine witnesses listed in the charge sheet. The only witness to stay away from the witness box, was SHO Police Station, Batote who recorded his

satisfaction regarding mode and manner of investigation and also prepared and presented the charge sheet.

4. The appellants when confronted with the incriminatory material appearing in the prosecution evidence against them, and given an opportunity to

offer explanation, if any, regarding such material, refuted veracity of the testimony of prosecution witnesses, attributed it to personal enmity and

insisted on their false implication. The accused examined two witnesses in their defence. The defence witnesses claimed to have been present in the

Nikha ceremony at the time of Nikha of the victim with accused Parvez Ahmed and that the parties contracted marriage in their presence.

5. The learned Trial Court on going through the charge sheet, prosecution evidence, statements of the accused u/s 342 Cr. PC as also the defence

evidence brought on file, vide Judgment dated 18-11-2008, held the prosecution to have proved its case against the accused beyond all

reasonable doubt and accordingly convicted the appellant-Parvez Ahmed of the offence punishable under sections 363, 342, 376 RPC and other

appellants of offences punishable under Sections 363,342, 376 RPC read with 109 RPC.

6. The Trial Court after hearing the Public Prosecutor and the defence counsel as also the accused on the quantum of punishment sentenced the

appellant-Parvez Ahmed as under:

I. Five years rigorous imprisonment and a fine of Rs.2000/- u/s 363 RPC and in default of payment of fine to further imprisonment of three months.

II. Three months rigorous imprisonment and a fine of Rs.5000/- u/s 342 Cr. PC and in default of payment of fine to further imprisonment of two

months.

III. Ten years rigorous imprisonment and a fine of Rs.5000/- u/s 376 RPC and in default of payment of fine to further imprisonment for a period of

six months.

7. The other four appellants found to have abetted commission of offences proved against the appellant- Parvez Ahmed, sentenced as under.

I. Five years rigorous imprisonment and a fine of Rs.2000/- u/s 363/109 RPC and in default of payment of fine to further imprisonment of three

months.

II. Six months rigorous imprisonment and a fine of Rs.1000/- u/s 342/109 RPC and in default of payment of fine to further imprisonment of two

months.

III. Seven years rigorous imprisonment and a fine of Rs. 3000/- u/s 376/109 RPC and in default of payment of fine to further imprisonment of four

years.

8. The judgment and sentence recorded by the Trial Court on 18-11-2008 is assailed in this Criminal Appeal on the following grounds:

i) That the Trial Court has not appreciated the evidence adduced by the prosecution in right perspective and has failed to notice important aspects

of the case, which if considered, would have persuaded the Trial Court to dismiss the charge sheet and acquit the accused.

ii) That Trial Court has failed to accord due consideration to the stand of appellant-Parvez Ahmed, that the victim was his legally wedded wife and

had of her own accord contracted marriage with the appellant on 18.12.2001 at Jammu; and that Nikhanama was duly proved by the appellant.

iii) That the Trial Court failed to appreciate that the charge of rape was belied by the medical evidence in as much as medical report indicated that

on medical examination of victim, spermatozoa were not detected in vaginal smear and that PW - Dr. Umesh Gandotra, who examined the victim

on 26-12-2001, expressed his inability to give any definite opinion regarding recent sexual intercourse.

iv) That the Trial Court did not accord due consideration to the defence set up that a civil suit commenced by the appellant on 13-9-2002 was

pending between the parties and an order was passed by Civil Court on 22-10-2002 in temporary injunction application, whereby the victim was

restrained from contracting marriage. The Trial Court is also said to have failed to take notice of the statement of the victim in proceedings u/s 100

Cr. PC before the JMJC/Sub Judge, Batote recorded on 21-6-2004 and the judgment of acquittal dated 13-10-2008 in case State v. Parvez

Ahmed File No.33/S under sections 366/363 RPC whereby the Trial Court (Sessions Judge), Ramban acquitted the appellant-1 of the charge of

having abducted the victim a second time along with her minor son during the night intervening 8/9 June,2004.

v) That the Trial Court failed to appreciate that real dispute between appellant -1 and the victim as also her parents was one relating to marital

relation of the parties; and that all other appellants/convicts had nothing to do with the matter and could not be held guilty of abetting commission of

offences punishable u/s 363,342,376 RPC by appellant-1.

9. I have gone through the memorandum of appeal, impugned judgment as also Trial Court record. I have also heard learned counsel for the

appellant and learned Deputy Advocate General, at length.

10. The main plank of the appellants' case is that the matter given colour of a criminal act, was, as a matter of fact, consensual in nature and that

the victim had of her own accord contracted marriage with appellant - Parvez Ahmed and is thus his legally wedded wife. It is pleaded that the

story of kidnapping, wrongful confinement and rape was outcome of enmity nursed by parents of the victim against the appellant - Parvez Ahmed.

It is insisted that consent of the victim to her marriage with the appellant - Parvez Ahmed, was writ large and evident from chain of events that led

to marriage/ Nikah of victim with the appellant - Parvez Ahmed.

11. It is urged that the victim, even if prosecution case was to be believed, accompanied the appellant-Parvez Ahmed from Batote to Jammu in a

vehicle and while travelling a distance of about 150 kilometres, did not raise any hue and cry and that her conduct was indicative of her consent to

accompany the appellant-Parvez Ahmed to Jammu and thereafter her marriage with him.

12. Learned counsel for the appellant is at pains to point out that anyone proceeding from Batote to Jammu is to pass through a number of

townships, army installations, security forces camps, police stations, police check posts and buss-market etc. and had the appellant-Parvez Ahmed

and his alleged accomplice kidnapped the victim, the victim would have prevented her kidnapping by raising her voice against it, attracted attention

of police personnel at police check posts and also the general public. It is argued that learned trial court failed to take into account these important

aspects of the case, while recording judgment of conviction against the appellants.

13. Learned counsel for the appellants insists that the statement of the appellant-Parvez Ahmed and the defence evidence brought on file including

Nikahnama EXPW-D1 convincingly substantiate the appellants' stand that the victim had consented to her marriage with the appellant-Parvez

Ahmed and that the dispute between the parties was essentially a marital dispute given colour and complexion of a criminal act, by the relations of the victim.

14. The case set up and argument advanced by learned counsel for the appellants are built upon the assumption that the victim was a major/had

attained majority, on the date of occurrence and thus legally competent to take decisions regarding her life. The argument, however, is advanced

oblivious to the Trial Court finding that the victim on the date of occurrence i.e. 17th December, 2001 was a minor and her consent even if,

deducible from the attending circumstances, was of no consequence. Learned Trial Judge, while arriving at the conclusions rightly placed reliance

on date of birth (06.04.1984) of the victim as recorded in her school records. The prosecution evidence in this regard, does not appear to have

been controverted or questioned by the appellants before the Trial Court nor any effort made during cross examination to impeach/challenge the

credit-worthiness of the prosecution witnesses regarding this aspect of the case.

15. The offences of "kidnapping" and "rape" are treated differently in Ranbir Penal Code Samvat 1989 as regards age of victim. Whereas

consent" of the victim below 18 years of age is inconsequential as regards offence of "kidnapping", yet "consent" of victim below 18 years of age

but above 16 years is relevant, when the offence alleged is "rape".

16. To illustrate "consent" attributed to the victim of 17 years of age, can be of no help to a person, accused of "kidnapping" the victim, whereas

consent" attributed to such a victim i.e. 17years of age, would be relevant and may very well enable a person, accused of offence of "rape" to go of

f the hook. The rationale behind difference in consequences of "consent" attributed to a victim, between 16 years and 18 years of age,

contemplated by the law makers, may not be difficult to understand. The offence of "kidnapping" is essentially an offence against "lawful

guardianship" of a minor girl and the "consent" attributed to the victim, does not dilute consequences of the act. The offence of "rape" on the other

hand is against person of victim and a person accused of committing "rape" on a girl between 16 years and 18 years of age may successfully set up

consent" of the victim as defence to avoid penal consequences of the act.

17. Viewed thus, in the back ground of defence set up, the appellants' case is to be dealt with distinctly as regards offence of "kidnapping" and

offence of "rape".

18. in terms of section 361 RPC, the offence of kidnapping from lawful guardianship is complete when a female under 18 years of age, is taken or

enticed away from lawful guardianship. In the circumstances, the consent attributed to the victim cannot by itself help the appellants to successfully

question the trial court judgment.

19. The events subsequent to the date of occurrence highlighted by learned counsel for the appellants- namely statement of the victim before

JMIC/Sub-judge, Hatote in an application filed by Shri Abdul Wahid, husband of the victim on 18th June, 2004, wherein the victim admitted to

have sometime in the year 2004 gone of her own free will with the appellant-Parvez Ahmed, to have resided and cohabited with appellant-Parvez

Ahmed and wanted to live with appellant-Parvez Ahmed, are of no assistance to the appellants. The appellants also cannot expect any help from

judgment of Sessions Court, Ramban dated 13th October, 2008 regarding alleged abduction (second occurrence) of the victim by the appellant-

Parvez Ahmed sometime in the year 2004. The acquittal, of appellant-Parvez Ahmed in the second case of abduction involving the victim can have

no spill over for the prosecution case or the judgment impugned in the present appeal. Similarly, the temporary injunction granted by a Civil Court

on 22nd October, 2002 whereby a restraint was to put on the marriage of the victim on the prayer made by the appellant-Parvez Ahmed, cannot

be of any use to the respondents in throwing challenge to the Trial Court judgment. This apart, the victim has deposed that the accused while taking

her from Batote to Jammu intimidated the victim, extended threats to her life, and played tape-recorder fitted in the vehicle on high volume and that

her sobs and cries were lost in the din of the music. The statement of the victim that has gone un-impeached in the cross examination explains

failure of the victim to raise any alarm on her way from Batote to jammu and leaves no room for inference of implied consent.

20. In the circumstances reliance placed on (1) State of Maharashtra Vs. Abdul Hafiz Faroki and Others, , (2) Suresh N. Bhusare and Others Vs.

State of Maharashtra, , and (3) Jinish Lai Shah v. State of Bihar AIR 2003 SC 2081 is grossly misplaced.

21. The plea that as the victim was held by the Trial Court to have been more than 16 years of age (17 years of age) at the time of alleged

occurrence, and the victim was a consenting party, the offence of ""rape"" within meaning of Section 375 RPC was not made out, is equally bereft of

any merit. The consent to be of any help to an accused facing the charge of ""rape"" must be free, and not induced by threat or fear. Helpless

submission, non-resistance, passive giving in, acquiescence are not equivalents of or substitutes for ""consent"". Consent attributed to a victim, must

involve voluntary participation and an informed and free choice between resistance and willingness. It may not be safe to infer ""consent"" from the

behaviour subsequent to the event as such behaviour may be influenced by realization that sexual assault made without ""consent"" had made the

victim to lose her most precious asset and there was little reason to resist any subsequent overtures. Similarly, ""consent"" at a particular point of time

cannot be used to infer ""consent"" at a subsequent stage.

22. In the present case, the plea of ""consent"" is built up on the marriage contract/Nikahnama EXPW-D1. The victim has not only emphatically

denied to have contracted marriage with the appellant-Parvez Ahmed but claimed to have rejected such a suggestion pleading that she was a minor

and not ready and competent to contract marriage with the appellant-Parvez Ahmed. The appellants as rightly pointed out by learned Trial Judge

neither put the suggestion to the victim that the victim was a consenting party nor put to her Nikahnama EXPW-D1, so as to enable the Court to

have her response. The victim was not in her cross examination, asked whether the victim had on 18th December, 2001 contracted marriage with

the appellant-Parvez Ahmed or put the suggestion that such marriage had taken place with her consent. The appellant No. 1 raised plea of

marriage for the first time in his statement u/s 342 Cr. PC. No explanation has come forth from the appellant no. 1 for not producing the

Nikahnama that according to him had come into existence a few years before it was produced or not confronting the victim with it, though it was

claimed to bear her signature. The genuineness of Nikahnama, thus is not free from doubt. Learned Trial Judge was right in rejecting the argument

that the attending facts were indicative of ""consent"" of the victim. This apart, victim was taken to Jammu on 17th December, 2001, subjected to

rape by appellant-Parvez Ahmed on the said date and continued to be sexually assaulted till her recovery from the residence of appellant-Farooq

Ahmed on 24.12.2001. The marriage, according to the appellant-Parvez Ahmed, was contracted on the next following date i.e. 18th December,

2001. The Nikahnama thus is an event after the commission of offence and even if taken into consideration does not lead to the conclusion that the

victim was consenting party, or the occurrence was a consensual affair.

23. There is no scope for any disagreement with learned Trial Judge that minor discrepancies and contradictions here and there, in testimony of the

victim or other prosecution evidence are indicative of truthfulness or veracity of the testimony rendered and not of falsehood or concoctions.

24. Parrot like statements by the witnesses, we are aware, suggest tutoring and thus are not creditworthy. In the present case, the deposition made

by the victim was tested at the anvil of cross examination and the testimony rendered by victim came out un-impeached and un-scathed. Learned

Trial Judge has rightly held the statement of the victim creditworthy and inspiring confidence. The plea that as no spermatozoa were detected in

vaginal smear and as the doctor who examined the victim, two days after recovery, expressed his inability to give any opinion regarding "recent

sexual intercourse", learned Trial Judge should have felt persuaded to reject the prosecution case, cannot be accepted. It is pertinent to point out

that PW Dr. Umesh Gandotra in his medical report EXPW/6/1 recorded "hymen to be torn" and the report corroborated the testimony of the

victim. Absence of spermatozoa in vaginal smear two days after the recovery of the victim is not sufficient to belie the victim, whose testimony is

otherwise found reliable and convincing. The Trial Court has thus rightly placed reliance on the prosecution evidence and held the prosecution to

have proved its case against the appellant beyond reasonable doubt.

25. This, however, does not end the matter. The extent of involvement of the appellants other than the appellant no. 1 in the alleged occurrence, in

the facts and circumstances of the case, deserves to be given a second look.

26. The Trial Court has convicted the appellants-Imtiyaz Ahmed, Tan veer Ahmed, Swami Raj and Farooq Ahmed (Appellants 2 to 5) amongst

other offences of the offence punishable u/s 376 read with section 109 RPC. The appellants, in other words, have been held guilty of abetting

offence of "rape".

27. Section 107 Ranbir Penal Code Samvat 1989 defines the abetment of a thing as under:

A person abets the doing a thing, who-Firstly- Instigates any person to do that thing; or Secondly- Engages with one or more other person or

persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the

doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation. 1 - A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily

causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

xx

Explanation. 2 - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act,

and thereby facilitates the commission thereof, is said to aid the doing of that act.

28. The present case obviously falls within clause Thirdly of Section 107 Cr. PC. A closer look at the Section 107 RPC, Thirdly reveals that a

person abets the doing a thing, if he intentionally aids, doing of that thing. The word ""intentionally"" preceding the word aids is of utmost importance

and is deciding factor in concluding whether aid extended or facility made available amounts to abetment. A person's action or omission may

facilitate the commission of an act but still he may not be held guilty of abetting that act, for the reason that such person did not intend to aid doing

of an act, though aid extended facilitated doing of such act. To illustrate, a person lending his vehicle to his friend cannot be held to have abetted

kidnapping, if his friend without his knowledge makes use of the vehicle for commission of the offence, though availability of vehicle facilitated

commission of the offence. The reason being that the person did not lend the vehicle with the intention to aid commission of the offence. Same is

true about a hotelier, providing room to a person found to have committed an offence while occupying the room or a Marriage Hall Owner, renting

out his marriage hall to a person later found to have committed offence of bigamy. The facility provided must not be only essential for commission

of crime but provided with the intention to facilitate commission of the offence. Criminality, it is well settled, depends not so much on the facility

given or aid provided, as on its nature and effect and the intention with which it is extended or given. The expression ""does anything in order to

facilitate the commission of that act"" in Explanation 2 to Section 107, makes it very clear that the facility must have been extended with the intention

to facilitate commission of the act. It would not stiff ice, to constitute offence of abetment, if facility without there being any intention on the part of

the person providing such aid or facility to facilitate the commission of an act, even if aid extended or facility provided makes it possible or easy for

the accused to commit the offence. In any case, the baseline is intention with which aid is extended or the facility provided.

29. In the present case though the appellants 2, 3, and 4 intentionally aided kidnapping of the victim at Batote and her travel from Batole to Jammu

to the residence of the appellant, yet the appellants 2 to 5 cannot be held guilty of abetting commission of offence punishable u/s 376 RPC. The

appellants by taking the victim from lawful guardianship of father and taking her to Jammu may have made it easy for the appellant no. 1 to commit

the offence, but cannot be said to have intentionally aided commission of offence of ""rape"".

30. The appellants 2, 3 and 4 as per prosecution evidence after accompanying the appellant no. 1 and the victim from Batote to Jammu left the

appellant no. 1 and the victim when they reached house of appellant no. 5 and the appellant no. 5 allowed the appellant no. 1 to bring the victim

inside his house and permitted the appellant to stay with the victim in his house for next seven days. Neither the appellants 2, 3, and 4 by

accompanying the appellant no. 1 and the victim from Batote to Jammu nor the appellant no. 5 by providing the residential facility to the appellant

no. 1 can be said to have intentionally aided, commission of offence of ""rape"" or ""done anything in order to facilitate the commission"" of the offence

by appellant no. 5. The facility provided was neither essential for commission of the offence nor did appellant 2,3, and 4 intentionally aid

commission of the offence.

31. So viewed, the appellants 2 to 5 cannot be held guilty of offence punishable u/s 376 read with Section 109 Ranbir Penal Code.

32. Next comes the question of sentence. It is submitted by learned counsel for the appellants that as the appellants have in the memo of appeal

made a prayer for setting aside the sentence, the Court while dealing with the appeal is required to look into proportionality of the sentence against

the backdrop of the facts and circumstances brought on the file. Though the developments that have taken place subsequent to the occurrence may

not help the appellants to successfully question the conviction recorded by Learned Trial Court, yet such facts and circumstances merit to be

considered while dealing with the question of proportionality of the sentence. It appears that the victim after the occurrence in question, went with

the appellant No. 1 and on her own admission, lived and cohabited with him for quite sometime. The occurrence lead to registration of Case FIR

No. 157 of 2001 Police Station, Batote. The investigation culminated in the charge sheet against the appellant. The Trial Court, however, vide

Judgment dated 13th October, 2008 acquitted the appellant no.1 of the charge of having abducted and committed rape on the victim. The husband

of the victim after the victim went away with the appellant no. 1 filed an application u/s 100 Cr. PC. The concerned police in execution of the

warrant u/s 100 Cr. PC produced the victim before Sub Judge/JMIC, Batote. The victim in her statement admitted to have gone of her own free

will with the appellant No. 1 and to have lived and cohabited with him and expressed her desire to live with the appellant No.1. Though, Learned

Sub Judge/JMIC, Batote declined her prayer, yet the statement of the victim cannot be lost sight of while deciding on the punishment to be

awarded to the appellant.

33. The relationship between appellant No.1 and victim after the occurrence and the stand taken by the victim before the Magisterial Court are

indicative of forgiveness and atonement. Against the said backdrop, there are valid reasons for giving a second look to the punishment awarded to

the appellants for the offences held proved against them.

34. In State of Punjab v. Rakesh Kumar AIR 2009 SC 391, where the victim was undisputably less than 16 years of age at the time of

occurrence, the evidence on the file pointed to a love affair between the victim and the accused and father of the victim had filed an affidavit before

the High Court that since the victim is settled in life a liberal view may be taken so far as sentence is concerned, the accused convicted of offence

punishable under 376 IPC, was sentenced to three years rigorous imprisonment and a fine of Rs.10,000/- and default sentence of one year.

35. For the reasons discussed above, while conviction of the appellant No. 1 of the offences punishable under sections 363,376,342 is upheld and

maintained, the appeal is allowed to the extent of sentence awarded by the Trial Court for the offence punishable u/s 376 RPC and the sentence

reduced from ten years rigorous imprisonment to five years rigorous imprisonment without any change in sentence of fine or the imprisonment, the

appellant no. 1 is directed to undergo, in the event of default in payment of fine. The sentence awarded for offences punishable under sections 342

and 363 shall remain unaltered.

36. The appeal to the extent of conviction of the appellants 2 to 5 of offence punishable u/s 376 read with section 109 RPC is allowed and

conviction of the appellants 2 to 5 and the sentence awarded, set aside. The appellants 2 to 5 are acquitted of the charge of having abetted

commission of offence punishable u/s 376. Conviction of appellants 2 to 5 for offences punishable under Sections 342, 363 read with 109 RPC is

upheld and maintained but the sentence awarded by the Trial Court for the offence punishable u/s 363/109 RPC is reduced to three years rigorous

imprisonment without any change in sentence of fine or the imprisonment, the appellants 2 to 5 shall suffer in default of payment of fine. There shall

be no change in the punishment awarded for the offence punishable u/s 342/109 RPC.

37. The appeal is disposed of accordingly.